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It is plain that the manifest purpose of this testator, in the case at bar, can be carried out and his estate appropriated as he directed without violating in any respect the provisions of the statute inhibiting a church from taking real estate by devise. We are, therefore, of opinion that the circuit court erred in so construing the will under consideration as to give the real estate passing thereunder to the heirs at law of the testator, thereby diminishing, to that extent, the fund dedicated by the testator to the election of a memorial to his deceased sister.

The decree appealed from must be reversed, and the cause remanded for further proceedings therein not in conflict with the views expressed in this opinion.

Reversed.

KEITH, P., absent.

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## DIGEST OF OTHER RECENT VIRGINIA DECISIONS.

### Supreme Court of Appeals.

Note.—In this department we give the syllabus of every case decided by the Virginia Supreme Court of Appeals, except of such cases as are reported in full.

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### VIRGINIA RY. & POWER CO. *v.* FEREBEE.

June 12, 1913.

[78 S. E. 556.]

**1. Limitation of Actions (§ 195\*)—Defenses—Burden of Proof.**—Defendant has the burden of proof as to his plea of limitations.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 711-716; Dec. Dig. § 195.\* 9 Va.-W. Va. Enc. Dig. 450.]

**2. Limitation of Actions (§ 55\*)—Nuisances—Continuing Injury.**—Where repeated actions may be brought for a nuisance, plaintiff may recover for the injuries sustained for the five years next preceding the date of the action; but where but one action can be brought for the entire damages, past and future, the action is barred unless brought within five years from the accrual of the cause of action.

[Ed. Note.—For other cases, see Limitation of Actions, Cent. Dig. §§ 299-306; Dec. Dig. § 55.\* 9 Va.-W. Va. Enc. Dig. 387; 14 Va.-W. Va. Enc. Dig. 661.]

**3. Nuisance (§ 48\*)—Private Nuisance—Declaration—Recovery.**—A declaration which alleges a continuing nuisance does not prevent

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

a recovery thereunder for an occasional nuisance caused in the manner alleged in the declaration.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 113, 114; Dec. Dig. § 48.\* 10 Va.-W. Va. Enc. Dig. 541.]

**4. Nuisance (§ 49\*)—Private Nuisance—Continuous Nuisance—Recovery.**—A plaintiff suing for present and future damages caused by a continuous nuisance may show permanent injuries.

[Ed. Note.—For other cases, see Nuisance, Cent. Dig. §§ 115-117; Dec. Dig. § 49.\* 10 Va.-W. Va. Enc. Dig. 542; 14 Va.-W. Va. Enc. Dig. 788; 15 Va.-W. Va. Enc. Dig. 747.]

**5. Appeal and Error (§ 173\*)—Questions Reviewable—Theory of Case in Trial Court.**—Where the court and the parties in an action for a nuisance limited the recovery, if any, to the damages sustained prior to the commencement of the action, and the court without objection charged that no damages could be awarded unless suffered within five years, defendant was estopped on appeal to deny that plaintiff could maintain successive actions for the damages he might suffer from time to time, and he could not rely on limitations.

[Ed. Note.—For other cases, see Appeal and Error, Cent. Dig. §§ 1079-1089, 1091-1093, 1095-1098, 1101-1120; Dec. Dig. § 173.\* 5 Va.-W. Va. Enc. Dig. 282.]

Error to Law and Chancery Court of City of Norfolk.

Action by G. Benson Ferebee against the Virginia Railway & Power Company. There was a judgment for plaintiff, and defendant brings error. Affirmed.

*Williams, Tunstall & Thom*, of Norfolk, and *H. W. Anderson*, of Richmond, for plaintiff in error.

*Braxton & Eggleston*, of Richmond, *Thos. W. Shelton* and *Claude M. Bain*, both of Norfolk, for defendant in error.

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ROSENBERG *v.* UNITED STATES FIDELITY & GUARANTY  
CO. OF BALTIMORE, MD.

June 12, 1913.

[78 S. E. 557.]

**1. Appearance (§ 24\*)—Effect—Defects in Service—"Submission to Jurisdiction."**—An appearance of defendant to the action or a general appearance waives all defects in the process, and constitutes a submission by defendant to the jurisdiction of the court.

[Ed. Note.—For other cases, see Appearance; Cent. Dig. §§ 118-143; Dec. Dig. § 24.\* 7 Va.-W. Va. Enc. Dig. 677; 14 Va.-W. Va. Enc. Dig. 116; 15 Va.-W. Va. Enc. Dig. 82.]

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\*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.